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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 454

INTERNATIONAL HARVESTER COMPANY,
Petitioner,

vs.

WILLIAM WATERS and DONALD SAMUELS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HAMMOND E. CHAFFETZ
THOMAS M. THOMAS
GEORGE D. NEWTON, JR.
THOMAS A. GOTTSCHALK
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
130 East Randolph Drive
Chicago, Illinois 60601
Attorneys for Petitioner,
International Harvester
Company

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TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, granting the petitioner's Motion To Dismiss Or Alternatively For Summary Judgment is reported in *Waters* v. *Wisconsin Steel Works*, 301 F. Supp. 663 (N.D. Ill. 1969), and is reproduced as Appendix "A", *infra*.

The opinion of the Seventh Circuit is reported in *Waters* v. *Wisconsin Steel Works*, 62 LC ¶ 9435 (7th Cir. 1970), and is reproduced as Appendix "B", *infra*.

JURISDICTION

The judgment of the Seventh Circuit was entered on April 28, 1970. (App. B, p. 29b) This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1) (1965).

QUESTIONS PRESENTED

1. Does the decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which construes 42 U.S.C. § 1982, authorize suit in federal court under 42 U.S.C. § 1981 for alleged racial discrimination in private contractual relations?

2. Does 42 U.S.C. § 1981, which bars local governments and communities from impairing the legal capacity of minority groups to make and enforce contracts, also proscribe racial discrimination by a private individual in his choice of employment relationships?

3. Is a right to sue for private employment discrimination under 42 U.S.C. § 1981 superseded by the comprehensive federal remedy for such discrimination provided in Title VII of the 1964 Civil Rights Act?

4. Assuming a right to sue for private employment discrimination under 42 U.S.C. § 1981, (a) does *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), apply retrospectively to discriminatory conduct occurring prior to that decision, and (b) what statute of limitations applies to such suits?

5. Is an employee who sues for breach of a collective bargaining agreement under section 301(a) of the Labor-Management Relations Act excused from first attempting to exhaust exclusive contractual grievance procedures because he believes such an attempt would prove futile?

STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIII.

> *Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> *Section 2.* Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIV, §§ 1, 5.

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> *Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1981 (1965).

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 301(a), Labor-Management Relations Act, 29 U.S.C. § 185(a) (1965).

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, § 858(a) (1969).

> Whenever within 120 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge or summary thereof on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice. . .

Ill. Rev. Stat. ch. 83, § 16 (1969).

> Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

STATEMENT OF THE CASE

(a) The Parties

Petitioner, International Harvester Company, operates a plant in Chicago, Illinois known as Wisconsin Steel Works which employs a small force of bricklayers to maintain and repair blast furnaces. (R. 144) Local 21, United Order of American Bricklayers and Stone Masons (Local 21)[1] is the exclusive bargaining representative for the bricklayers employed by Harvester. (R. 50) The respondents, William Waters and Donald Samuels, are black bricklayers. (R. 3)

(b) History of the Suit

This suit was initiated by respondents against petitioner Harvester under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1965).[2]

In April 1966, respondents mailed applications for employment to Harvester. (R. 100, 143) On May 20, 1966, respondents filed charges with the Illinois Fair Employment Practices Commission (FEPC) alleging that Harvester had failed to hire them on racial grounds. (R. 151, 153) Identical charges were filed three days later with the Equal Employment Opportunity Commission (EEOC). (R. 155, 156) The state commission dismissed these charges on August 19, 1966, as unsupported by substantial evidence (R. 24, 26) and, on February 16, 1967, the EEOC found that no reasonable cause existed to believe that Harvester had violated Title VII.[3] (R. 155)

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1. Local 21 has filed a separate petition for certiorari.
2. Hereinafter cited as Title VII.
3. Local 21 was not charged as a party in the EEOC proceeding against Harvester. (R. 15, 16)

In March 1967, respondent Waters alone sought reconsideration of the EEOC's determination based on new allegations relating to an amendment to the bricklayers' collective bargaining agreement with Harvester which was dated June 15, 1966. (R. 162) This amendment's sole effect was to restore seniority to eight former Harvester bricklayers with six years or more service whose seniority had been broken in March 1965 after receiving severance pay while on layoff.[4] (R. 148, 149, 154) After June 15th, three of these eight experienced bricklayers were offered and accepted re-employment by Harvester before employment was offered bricklayers with less seniority and new applicants. (R. 6, 7, 164)

The EEOC reconsidered its initial "no cause" finding and, on July 10, 1968, found that the June 15th amendment provided reasonable cause to believe that Harvester had violated Title VII by not hiring respondents in April 1966 and by rehiring three of the eight white bricklayers whose seniority had been restored in June 1966. (R. 160, 165) Following unsuccessful conciliation efforts, the EEOC on November 29, 1968 notified the respondents of their right to sue. (R. 8) Respondents' complaint was filed in the District Court for the Northern District of Illinois on December 27, 1968. (R. 144)

The federal court complaint (R. 2-10) considerably broadened the issues presented to the EEOC. For the first time,

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4. The collective bargaining agreement had been amended on March 2, 1965 by offering severance pay to twenty bricklayers with six to ten years service who Harvester anticipated would no longer be needed after conversion from open hearth to oxygen furnaces. (R. 148, 149) Experience with the oxygen furnaces, however, indicated that bricklayers would have to be recalled, and it was agreed by Harvester and Local 21 on June 15, 1966 that seniority should be restored to the eight employees who had lost it by accepting severance pay. (R. 154)

Local 21 was identified by respondents as a party to the alleged discrimination. The April 1966 failure to hire respondents and the June 1966 amendment to the labor contract were subsumed in a sweeping allegation that Harvester and Local 21 were guilty of a continuing practice of racial discrimination in hiring bricklayers, adhering to the bricklayers' seniority system, and training bricklayers in an apprenticeship program.

Not relying on Title VII alone, respondents grounded their claim for relief on three additional alleged statutory violations: 1) the post-Civil War Civil Rights Acts, 42 U.S.C. § 1981 (1965)[5]; 2) section 301(a), the Labor-Management Relations Act, 29 U.S.C. § 185a (1965); and, 3) the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1965). Petitioner moved for dismissal or alternatively for summary judgment on all claims and both sides submitted affidavits and exhibits. Respondents abandoned their claim under the National Labor Relations Act. (App. B, p. 25b)

The District Court dismissed the remaining three claims on jurisdictional grounds. The Court held that section 1981 does not apply to actions of private parties and, in view of its conflict with Title VII, should not be extended to discrimination in private employment contracts. (App. A, p. 3a-5a) The Title VII claim against Local 21 was held defective because the union had not been made a party to the administrative charge before the EEOC as required by 42 U.S.C. § 2000e-5(e). (App. A, p. 5a, 6a) Since respondents' prayer sought nullification of the labor contract's provisions and a "restructuring" of the seniority system, Local 21 was found to be, under Rule 19b, a party needed for a just adjudication who could not be joined and without

5. Hereinafter referred to as section 1981.

whom the Title VII suit against Harvester should not proceed. (App. A, p. 6a) The remaining claim for a breach of the collective bargaining agreement under section 301(a) of the Labor-Management Relations Act was dismissed because respondents failed even to attempt to exhaust the exclusive grievance process established by the collective agreement. (App. A, p. 6a, 7a)

The Seventh Circuit reversed and remanded for a trial against Local 21 under section 1981 and against Harvester under Title VII.[6] The majority opinion[7] held "that a right to sue under section 1981 for 'private' racial discrimination in employment existed prior to 1964," but that "to avoid irreconcilable conflicts between section 1981 and Title VII, a plaintiff must exhaust his administrative remedies before the EEOC unless he provides a reasonable excuse for his failure to do so." (App. B, p. 5b) On the record before it, the Court determined that respondents had such an excuse since they "were, at least arguably, unaware of the participation of Local 21 in Harvester's alleged policy of racial discrimination" at the time the initial EEOC charges were filed. (App. B, p. 18b)

The Seventh Circuit also reversed and remanded the section 301(a) claim on the theory that plaintiffs' failure to follow their exclusive grievance procedures could be excused if they reasonably believed that attempts to seek the aid of the union in presenting a grievance would be utterly futile. (App. B, p. 22b-26b) The Court held that a section 301(a) claim was stated against Local 21 for "fail-

6. Since affidavits were relied upon by the parties, the Court of Appeals treated the District Court's ruling as a summary judgment. (App. B, p. 2b)

7. Judge Fairchild concurred in the result and filed a separate opinion concluding that the District Court had jurisdiction over *both* defendants under Title VII and that the section 1981 issues should not be reached. (App. B, p. 26b-28b)

ure to timely assert an employee grievance" even though respondents had not submitted a grievance. (App. B, p. 26b) Because of its ruling on section 1981, the Court did not reach the Rule 19 issue regarding Local 21's joinder in the Title VII action against Harvester. (App. B, p. 21b)

(c) Harvester's Employment of Respondents and Other Black Bricklayers

Although Harvester emphatically denies respondents' ultimate conclusion of racial discrimination, "the facts as alleged in the complaint and supplemented by affidavits are not in material dispute." (App. B., p. 2b)

Of the 4,575 persons employed by Harvester at Wisconsin Steel Works, 1,700 are minority group members. (R. 156) When this complaint was filed, Harvester had a bricklaying force of forty-four, including four blacks who had accrued seniority under the collective bargaining agreement with Local 21. (R. 144) The agreement in effect during 1966 provided: "Neither the Company nor the Union, in carrying out their obligations under this Contract, shall discriminate in any manner whatsoever against an employe[e] because of race, sex, political or religious affiliation, or nationality." (R. 51)

Respondent Waters was first employed as a bricklayer by Harvester on July 13, 1964 and worked until September 11, 1964, when he was laid off because of a reduction in force. (R. 99) Nine other bricklayers with no seniority, including six whites, were laid off at the same time. (R. 142) Respondents' complaint alleges that the hiring of black bricklayers in 1964 was a "nominal deviation" from a "racially discriminatory hiring policy" and that the layoff of ten bricklayers in the same year was based on a discriminatory seniority system. (R. 5) The President's Committee

on Equal Employment Opportunity found no discrimination in this layoff. (R. 142, 147)

Waters and the other bricklayers on layoff were recalled on March 8, 1967. (R. 143) Waters worked until May 19, 1967 when laid off with two bricklayers having seniority.[8] (R. 144) In August 1967, Waters failed to report to work after Harvester offered to re-employ him. (R. 100)

Respondent Samuels was never employed by Harvester. When he and Waters applied *by mail* for employment in April 1966, no bricklayers were hired because over twenty bricklayers were then on layoff, four of whom had seniority. (R. 143) The collective bargaining agreement requires that bricklayers with seniority who are on layoff be recalled before hiring new applicants. (R. 84, 85)

At no time did either respondent attempt to initiate the exclusive four-step grievance and arbitration process, provided by the collective bargaining agreement,[9] with respect to either their April 1966 job applications or the June 15, 1966 amendment to the collective bargaining agreement. (R. 29) The only time a respondent ever requested union representation was in November 1967 when Samuels complained to a union steward about being laid off by an employer other than Harvester. (R. 238)

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8. Because he had not worked ninety consecutive days as required by the collective bargaining agreement (R. 84), respondent Waters remained a probationary employee and never achieved seniority.

9. The collective bargaining agreement in force in 1966 established an exclusive "no-strike" grievance procedure for resolving all alleged violations of the contract. The four steps of this procedure are: (1) conference with employer and foreman, (2) conference with union agent and industrial relations department, (3) conference with other union and management designees, and (4) binding arbitration. The individual employee must thus take the first step and initiate the second step by requesting union representation. (R. 86-88)

REASONS FOR GRANTING THE WRIT

This case "raises important questions concerning the availability and scope of various federal remedies for combating racial discrimination in employment." (App. B, p. 1b). Of premier importance is the Seventh Circuit's fashioning of an undefined new federal remedy for employment discrimination under section 1981 through an expansive construction of *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). This misreading of *Jones* upsets the political balance struck by Congress in Title VII between equal employment opportunity, employer freedom and labor rights.

The *Jones* decision does not compel the far-reaching result of the Seventh Circuit. The uncertain thrust of *Jones* is readily apparent in the mounting conflict and confusion among lower federal courts over the types of "private" discrimination which are actionable under the Civil Rights Acts of 1866 and 1870. Guidance from the Court is urgently required to assure the uniform application of federal law in this sensitive area of race relations.

Since a century of precedent would be overturned if the Seventh Circuit's extension of the *Jones* ruling is left standing, the Court should, in that event, temper the *Jones* decision's disruptive impact on a host of existing contractual relationships. Reliance on prior law should be respected by denying retroactive effect to *Jones* in suits, such as this one, where the claim arose before the *Jones* case was decided but the suit was filed after that decision was announced. The unsettling effect of a dramatic extension of federal jurisdiction under section 1981 also could be controlled by applying to such federal court suits the limitations period for the most analogous state claim—in this case, a complaint for unfair employment practices.

Of independent importance is the Seventh Circuit's view

that employees need not even attempt to exhaust their exclusive collective bargaining grievance procedures, as required by section 301(a), prior to filing suit for breach of their labor contract. The decision below should be reviewed because it is at war with the long-standing legislative purpose of enforcing collective bargaining agreements, including their exclusive grievance procedures, and directly conflicts with the Court's decisions, most recently *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

I. The Court Should Decide Whether Section 1981 Authorizes Federal Court Suits For Private Employment Discrimination.

In *Jones* v. *Alfred H. Mayer Co.*, the Court held that 42 U.S.C. § 1982[10] "bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." 392 U.S. at 413. Relying on analogy to the *Jones* decision, the Seventh Circuit in this case read a different statute, section 1981,[11] "to prohibit private racial discrimination in employment by companies and unions" and to be "a valid exercise of congressional power under the thirteenth amendment." (App. B, p. 7b) The Seventh Circuit's questionable construction of section 1981 and the *Jones* decision present

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10. Section 1982 provides in relevant part:
"All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."

11. Section 1981 provides in relevant part:
"All persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, . . ."

novel and far-reaching federal questions which should be settled by the Court.

A. The Significance Of The Section 1981 Ruling.

The Seventh Circuit is the first and only court of appeals to rule that no trace of state action or community custom is required for federal jurisdiction of a suit for employment discrimination under section 1981.[12] This ruling allows a federal court action[13] every time a black is denied a job or his employment contract is breached on the theory that he was denied an equal right to make or enforce an employment contract. The Civil Rights Acts of 1866 and 1870, designed to eradicate sweeping governmental and regional restraints on former slaves' freedom to contract,[14] are thus refurbished a century later by the Seventh Circuit to become an artlessly vague but absolute federal unfair employment practices law.

The rationale of the Seventh Circuit's ruling carries well beyond employment contracts since section 1981 expressly embraces all types of contracts.[15] The decision below thus parallels *Scott* v. *Young*, 421 F.2d 143, 145 (4th Cir. 1970), *cert. denied* 38 U.S.L.W. 3461 (May 26, 1970), in which the Fourth Circuit, without analysis, ruled broadly that

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12. The lower federal court decisions construing section 1981 are discussed at pp. 24-26, *infra*.

13. The $10,000 jurisdictional amount is not applicable to civil rights cases. See 28 U.S.C.A. § 1343 (1965).

14. The legislative history of the early Civil Rights Acts is discussed briefly at pp. 19-21, *infra*.

15. The Seventh Circuit applied section 1981 to Local 21 by finding that an agency contract exists between a union and its members, and that a breach of this contract is actionable under section 1981. This conclusion alone concedes that section 1981 can be applied to all contractual relationships. See fn. 43, *infra*.

under *Jones* a "[r]efusal to extend the same contractual opportunity to blacks is . . . a violation of 42 U.S.C. § 1981."[16] By reading *Jones* to compel the simplistic result that every racially motivated refusal to contract violates section 1981, these decisions spread the panoply of federal court jurisdiction to the most mundane and everyday relationships.[17]

A collateral effect of the Seventh Circuit's extension of section 1981 is the dilution of Title VII, the primary existing federal remedy for employment discrimination. In a single decision, the Court below fulfilled a commentator's prophecy following the *Jones* decision:

> Indeed, that construction should prevent any employer from refusing 'to make a contract' of employment with a Negro; and the fair employment provisions of the 1964 Act likewise become superfluous, as does the entire struggle, since the days of the New Deal, to enact adequate fair employment legislation. Henkin, "Foreward: On Drawing Lines," 82 Harv. L. Rev. 63, 85-86 (1968).

Inconsistency, rather than superfluity, best characterizes Title VII in light of the "revived" section 1981 prohibitions.

Title VII was the product of a great political struggle which ended, as do most, in compromise. See *Miller* v. *Inter-*

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16. Unlike *Scott*, in which the court had jurisdiction under the 1964 Civil Rights Act, the Court here had no jurisdiction of Local 21 under that Act. The only possible basis for jurisdiction over the employment discrimination claim against Local 21 is section 1981. Also, unlike the instant case, the *Scott* case harmonizes with a long line of prior cases. See fn. 41, *infra*.

17. A host of everyday relationships are contractual—delivering the morning paper, leaving a car to be repaired, phoning for a taxicab, ordering a meal. See 17 Am.Jur.2d, Contracts, § 1 (1964).

national Paper Co., 408 F.2d 283, 286 (5th Cir. 1969). The compromise was not merely of regional interests but represented a balance of competing principles. Along with equal employment opportunity, ". . . Congress was concerned with the close, personal atmosphere of small businesses. . . ."[18] Comment, 36 U. Chi. L. Rev. 615, 625 (1969). Thus, Title VII exempts from its coverage employers of less than 25 employees[19] and preserves small employers' freedom to hire and work with persons of their own choice. In sharp conflict, section 1981, as construed below, covers all employers regardless of the number of employees. Extension of section 1981 to all private employment discrimination erases other Title VII exemptions such as those for educational institutions,[20] private membership clubs,[21] and businesses on or near Indian reservations.[22]

Title VII also represents a careful accommodation of federal labor policy with federal anti-discrimination objectives. It is apparent from Title VII that Congress did not wish equal employment opportunity to require that incumbent employees be turned out of their jobs or lose benefits won in the collective bargaining process. Title VII thus preserves distinctions based on bona fide seniority systems[23] and renounces preferential treatment of minority groups whose employment is less than the percentage which their numbers bear to the total available local work force.[24]

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18. Senator Humphrey defended Title VII's coverage of employers of 25 or more employees because he felt businesses of 25 or more employees "lose most of whatever intimate, personal character they may have had." 110 Cong. Rec. 13088 (1964).
19. 42 U.S.C. § 2000e-(b) (1965).
20. 42 U.S.C. § 2000e-1 (1965).
21. 42 U.S.C. § 2000e-(b) (2) (1965).
22. 42 U.S.C. §§ 2000e-(b) (1), 2(i) (1965).
23. 42 U.S.C. § 2000e-2(h) (1965).
24. 42 U.S.C. § 2000e-2(j) (1965).

In short, to hold that section 1981 prohibits all private employment discrimination will, as the District Court observed, "create a body of law independent from and in potential conflict with the detailed congressional scheme regulating employment embodied in Title VII." (App. A, p. 4a)

The Seventh Circuit recognized the basic inconsistency of Title VII and section 1981[25] and accordingly modified "the absolute right to sue under that section" by requiring that the aggrieved person plead "a reasonable excuse for his failure to exhaust EEOC remedies." (App. B, pp. 17b, 18b) This judicial modification, more worthy of Congress than a federal court, is a concession to procedure only which is intended to preserve the usefulness of the Equal Employment Opportunity Commission created by Title VII. The substantive conflicts between Title VII and section 1981 remain unresolved.

The significance of the statutory conflict created by the Seventh Circuit's decision is brought into clear focus with the fact, as noted by respondents in the District Court, that thirteen million employees and nearly 80% of the nation's employers are excluded from Title VII's coverage by its limitation to employers of 25 or more employees.[26] During the debates on Title VII, Senator Humphrey estimated that all the Act's exclusions would leave more than half of the national work force outside its scope.[27] Since the per-

25. The Court stated: "we agree that the difficulties in reconciling section 1981 and Title VII are great and that the areas of possible conflict are numerous." (App. B, p. 14b)

26. *Hearings on H.R. 8998 and 8999 Before The General Subcommittee Of The House Committee On Education & Labor*, 89th Cong., 1st Sess. 108 (1965).

27. Senator Humphrey cited social security figures indicating that Title VII's limitation to facilities with 25 or more employees exempted 44 million of 73 million employees. 110 Cong. Rec. 13090 (1964). The Senator estimated that Title VII would apply to only eight percent of the nation's employers. *Ibid.*

sons not covered by Title VII could not be expected to exhaust EEOC remedies, the Seventh Circuit's ruling gives them a license to sue directly in federal court under section 1981. For the remaining national work force, the Seventh Circuit would make section 1981 a fall-back remedy in the event an employee is precluded from proceeding under Title VII.[28]

In light of these irreconcilable conflicts between Title VII and section 1981, as construed by the Court below, Title VII supersedes whatever remedy for employment discrimination section 1981 may have offered. *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). Certainly, the Seventh Circuit was not observing Congress' objective by reading the two Acts to be overlapping and conflicting. By restricting Title VII to private discrimination and expressly making it inapplicable to states and their political subdivisions,[29] Congress intended to eliminate conflicts with other laws, such as section 1981, which prohibit employment discrimination by state and local governments.[30]

Moreover, Congress enacted Title VII when no court had even hinted that private employment discrimination might be actionable under section 1981. This is far different from the *Jones* case where Title VIII of the 1968 Civil Rights Act was passed *in anticipation of* a related remedy being

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28. All that an employee covered by Title VII must allege before bypassing that remedy and suing instead under section 1981 is that he had a "good reason" for doing so. (App. B, p. 18b)

29. 42 U.S.C. § 2000e(b) (1965).

30. The exemption of state and local governments was agreed to because the Fourteenth Amendment's equal protection clause already prohibited discrimination "with regard to public employment opportunities." *Hearings On H.R. 8998 and 8999 Before The General Subcommittee Of The House Committee On Education & Labor*, 89th Cong., 1st Sess. 121 (1965).

framed under section 1982 and thus was not intended to repeal the earlier provision. 392 U.S. at 415. Unlike some of its sister provisions in the 1964 Civil Rights Act, such as Title II, Title VII contains no express statement that prior legislation is to be preserved. See *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969). The absence of a saving clause in Title VII and the conflict created by the Seventh Circuit's ruling under section 1981 compels the conclusion that any remedy for private employment discrimination under section 1981 was superseded by Title VII.

This Court should review the Seventh Circuit's section 1981 ruling to decide whether an unprecedentedly broad federal cause of action for private discrimination in contracts exists under that statute and, if so, whether Title VII precludes the application of section 1981 to private employment contracts.[31]

B. The Erroneous Construction Of *Jones* By The Seventh Circuit.

This Court should also review the Seventh Circuit's view that the *Jones* case compels the extension of section 1981 to cover private employment relationships. The *Jones* opinion by no means dictates such a broad construction of section 1981.[32] *Jones* is indeed readily distinguishable from this case on the basis of statutory language, legislative history, precedent and the facts.

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31. The exercise of certiorari jurisdiction is particularly appropriate for the "settlement of [such issues] of importance to the public . . ." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

32. The majority opinion in *Jones* carefully refrained from deciding the applicability of section 1981 to "discrimination in the provision of . . . services" pursuant to contract. 392 U.S. at 414 (fn. 10).

Statutory Language

The language of section 1981 demonstrates that the right to make and enforce contracts is but one of many guarantees of equal standing under the law. Congress in that section assured blacks the rights "to sue, be parties, [and] give evidence"; to receive the "full and equal benefit of all laws and proceedings"; and to "be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, . . ." Unlike section 1982 which protects only the rights to convey and hold property, the most natural construction of section 1981 is that it was designed to afford blacks an equal opportunity to enforce legal rights and to receive equal treatment at the hands of state authorities.

Legislative History

The function of section 1981 as a statutory embodiment of the equal protection clause of the Fourteenth Amendment is revealed by its legislative history. Although language similar to sections 1981 and 1982 appeared in the 1866 Civil Rights Act, the rights now contained in section 1981 were rewritten and included as section 16 of the 1870 Civil Rights Act.[33] The 1870 Act was enacted two years after ratification of the Fourteenth Amendment to provide a constitutional underpinning for the application of the 1866 Civil Rights Act to the states. *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948).

Even assuming that these early Civil Rights Acts were intended to reach beyond the oppressive Black Codes to

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33. In contrast to Congress' express rewriting of section 1981 in 1870, the portions of the 1866 Act, which were later codified as section 1982, were re-enacted only by reference as section 18 of the 1870 Act. 81 Cong. Globe 662, 41st Cong. 2nd Sess. (May 31, 1870).

touch some private conduct, their reach was limited to combinations of private white citizens guilty of intimidating former slaves. Quotations from the congressional debates contained in the *Jones* opinion itself established that some legislators felt these outlaw combinations reflected prevailing community prejudices and were instruments of repression which reduced the black to slave status as effectively as had state laws.[34] Cf. *Hodges* v. *United States*, 203 U.S. 1 (1906), *overruled Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968) (fn. 78).[35] One scholar has observed that,

> . . . there is a limited amount of evidence that the Civil Rights Act did not exclude from its reach some private activities.
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> * * *
>
> On the other hand, it cannot be sufficiently stressed that the major goal of the act, though it was couched in language which made it applicable throughout the Union, was to give practical effect to the *repeal of discriminatory laws and customs* in the South. Casper, "*Jones* v. *Mayer:* Clio, Bemused and Confused Muse," Supreme Court Review 119, 121 (1968) (emphasis added).

The Court itself stated in *Jones* that when the 1870 Act

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34. These references to the congressional debates are found principally at 392 U.S. at 427-34. For example, Representative Cook is quoted as stating "that, without appropriate federal legislation, any 'combination of men in [a] neighborhood [could] prevent [a Negro] from having any chance' to enjoy those benefits." *Id.* at 434.

35. In light of the congressional concern over community-wide conspiracies, even the critics of *Jones* have approved its overruling of *Hodges* on the ground that community lawlessness, which may be the equivalent of state action, intimidates blacks from pursuing their employment. See Casper, "*Jones* v. *Mayer*: Clio, Bemused and Confused Muse," Supreme Court Review 89, 127 (1968).

was passed the "focus of congressional concern had clearly shifted from hostile statutes to the *activities of groups like the Ku Klux Klan, operating wholly outside the law*." 392 U.S. at 436 (emphasis added).

Precedent

The applicability of the 1866 Act to community customs and actions which prevent blacks from living in those communities also is supported by a line of authorities which foreshadowed the *Jones* and *Sullivan* decisions. The Court had previously invalidated zoning ordinances which require racial segregation[36] and barred judicial enforcement of racially restrictive covenants.[37] The Court had also indicated that individual constitutional rights cannot be abridged by placing control of communities in private hands.[38] More recently, the Court concluded that localities may not in any way sanction private discrimination in the sale of housing.[39] Similarly, in *Jones*, the developer of a one-hundred house suburban community, which included a golf course and other recreational facilities, was forbidden from excluding blacks.[40] In *Sullivan*, the Court abrogated a racial restriction limiting use of a community swimming pool to white homeowners in a particular neighborhood as a "device functionally comparable to a racially restrictive

36. *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

37. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

38. *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

39. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

40. The *Jones* opinion refers to the "exclusion of Negroes from white communities" as "a substitute for the Black Codes," and further emphasized its concern that "racial discrimination herds men into ghettos." 392 U.S. at 442-43. Thus, the Court in *Jones* applied section 1982 to a real estate developer who exercises far greater control over the racial mixture of communities than does the single homeowner.

covenant, the judicial enforcement of which we struck down . . . by reason of the Fourteenth Amendment." 396 U.S. at 236.[41]

No comparable line of cases exists extending the early Civil Rights Acts' prohibition against employment discrimination into the private sector. From the language of the statute, its legislative history, and the absence of supporting precedent, the Seventh Circuit's section 1981 ruling must be regarded as unjustified.

The Facts

If the instruction of *Jones* is that some types of private employment discrimination can be reached by section 1981, at least three facts favor limiting the statute's scope well short of this case. First, a refusal to hire, unlike a refusal to sell property, necessarily involves countervailing rights. A person desiring to sell property and a person interested in purchasing property need have no direct contact with each other but may deal completely through intermediaries. A successful relationship between employer and employee, however, depends on mutual confidence and involves regular contacts between the parties. A guarantee of an equal right to make an employment contract under section 1981

41. Like the *Jones* case itself, the facts in *Scott* v. *Young*, 421 F.2d 143 (4th Cir. 1970), *cert. denied* 38 U.S.L.W. 3461 (May 26, 1970), show that it harmonizes with accepted precedent barring community-wide discrimination in facilities otherwise open to the public. In *Scott*, a policy of refusing to sell admission tickets to blacks on the part of a twenty-acre recreational complex in Virginia otherwise open to the public and accommodating some 65,000 persons was outlawed as community-wide segregation of facilities. Of signal difference, the decision of Harvester not to hire the two respondents in April 1966 allegedly on racial grounds cannot be presumed to be a product of prevailing community prejudice nor to result in exclusion from a public facility.

cannot be presumed to mean that each black has a right to be hired even by an unwilling employer.[42] At maximum, the early Civil Rights Acts may bar community interference with an employment relationship between a black employee or applicant and a willing white employer.

In contrast to *Jones*, nothing in the record on appeal remotely suggests community interference with an employer-employee relationship or community exclusion of blacks from certain vocations. Because the Seventh Circuit's decision affects a private employment relationship involving only one employer, the decision below must be viewed as extending *Jones* well beyond its meaning.

The third important fact distinguishing *Jones* is that the Seventh Circuit's section 1981 ruling extends not only to employers, but also includes unions. (App. B, p. 7b) The Court below stated:

> "Racial discrimination in employment by unions as well as by employers is barred by section 1981. *The relationship between an employee and a union is essentially one of contract.* Accordingly, in the performance of its functions as agent for the employees a union cannot discriminate against some of its members on the basis of race. (App. B, p. 10b) (emphasis added)

The Seventh Circuit appears to be saying that the union's duty of fair representation is contractual[43] and therefore a breach of the duty exposes the union to liability under section 1981. Yet, the Seventh Circuit elsewhere in its

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42. See Casper, *supra*, at 97-99, quoting Lord Lindley:
"'This liberty [to earn a living] involved liberty to deal with other persons who were willing to deal with him.'"

43. This statement confirms that the Seventh Circuit construes section 1981 to apply to all contractual relationships. See pp. 13-14, *supra*.

opinion correctly held that "the origin of that duty [of fair representation] is statutory." (App. B, p. 25b) The Seventh Circuit's confusion is only a sample of the needless mischief which flows from the extension of section 1981 into the carefully regulated area of labor relations. The holding below that the early Civil Rights Acts apply to racial discrimination by unions against their members is patently an anachronism which has no basis in history or law.

The Seventh Circuit's misplaced reliance on *Jones* to radically extend the scope of section 1981 is inconsistent with the purpose of section 1981 and cries out for correction by this Court.

C. The Confusion And Conflict Caused By *Jones* And Section 1981.

Since the *Jones* decision was announced on June 17, 1968, several plaintiffs have sought to state a claim under section 1981 for private employment discrimination. Uncertain of *Jones'* scope, some courts have avoided ruling on the issue. Other courts are divided on whether such suits state a cause of action.

In the majority of post-*Jones* decisions, the district courts have held that there is *no* cause of action under section 1981 for private employment discrimination.[44] The

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44. In addition to the District Court's decision in this case, see: *Smith* v. *North American Rockwell Corp.*, 62 LC ¶ 9443 (N.D. Okla. 1970); *Harrison* v. *American Can Co.*, 61 LC ¶ 9353 (S.D. Ala. 1969); *Culpepper* v. *Reynolds Metals Co.*, 296 F. Supp. 1232 (N.D.Ga. 1969), *rev'd on other grounds* 421 F.2d 888 (5th Cir. 1970); *Colbert* v. *H-K Corp.*, 295 F. Supp. 1091 (N.D.Ga. 1968); *Kendrick* v. *American Bakery Co.*, 58 LC ¶ 9146 (N.D.Ga. 1968); *Norman* v. *Missouri Pac. R.R.*, 58 LC ¶ 9144 (E.D. Ark. 1968), *rev'd on other grounds* 414 F.2d 73 (8th Cir. 1969).

cases decided before *Jones* also reached the same result.[45] Three district courts have concluded that section 1981 confers federal jurisdiction over claims alleging private discrimination.[46] None of these three courts appears to have considered either the conflict between Title VII and section 1981, or the unlimited scope of a federal remedy for all discrimination involving contractual relationships.

Although three courts of appeals have been asked to rule on whether *Jones* requires the federal courts to hear private employment discrimination suits under section 1981, only the Seventh Circuit in this case has decided the issue. The other two opinions[47] utilized the approach urged by Judge Fairchild in his concurrence below of deciding the cases on other points.

The Seventh Circuit's decision also is in diametric conflict with prior law holding that there is no constitutional right to work for an individual employer without his consent.

> The right to life, liberty and pursuit of happiness includes the right to work and earn an honest living but does not include the right to work for any particular individual without such individual's consent. *Van Zandt* v. *Mckee*, 202 F.2d 490-491 (5th Cir. 1953).

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45. *Ball* v. *Yarborough*, 281 F.2d 789 (5th Cir. 1960); *Waters* v. *Paschen Contractors, Inc.*, 227 F. Supp. 659 (N.D. Ill. 1964). Of course, numerous cases held that state action was a jurisdictional requirement of section 1981. *E.g.*, *Watkins* v. *Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950); *Moffett* v. *Commerce Trust Co.*, 187 F.2d 242 (8th Cir. 1951).

46. *Clark* v. *American Marine Corp.*, 304 F. Supp. 603, 611 (E.D.La. 1969); *United States* v. *Medical Soc. of S. Car.*, 298 F. Supp. 145 (D.S.C. 1969); *Dobbins* v. *Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968).

47. *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 895 (5th Cir. 1970); *Norman* v. *Missouri Pac. R.R.*, 414 F.2d 73, 75 (8th Cir. 1969) (fn. 3.).

Other lower courts have rejected assertions that the Constitution affords a right to work for a particular employer and dismissed such claims filed under the early Civil Rights Acts. *Love* v. *Chandler*, 124 F.2d 785, 786-87 (8th Cir. 1942); *Elders* v. *Consolidated Frt. Corp.*, 289 F. Supp. 630, 632-635 (D. Minn. 1968) (post-*Jones*).

The division of authority developing under section 1981 and the conflict of the ruling below with pre-*Jones* decisions highlight the urgency of clarification by the Court concerning the effect of *Jones* on the scope of section 1981.

II. The Unsettling Impact Of *Jones* v. *Mayer* Should Be Limited.

Prior to *Jones*, there was no indication that section 1981 some day might be enforced against alleged discrimination in private employment contracts. *E.g.*, *Hodges* v. *United States*, 203 U.S. 1 (1906), *overruled Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968) (fn. 78). Now to apply *Jones* retroactively to suits for private employment discrimination[48] under section 1981 would expose literally millions of settled transactions to federal court litigation and thereby penalize individuals who had relied on the prior law limiting section 1981 to state action. To minimize such unfairness, this Court should reverse the Seventh Circuit's refusal to apply *Jones* only prospectively and subject section 1981 suits to the same limitations period which state law provides for analogous claims of discriminatory employment practices.

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48. Different considerations affecting the retroactivity issue may be involved in cases alleging discrimination in the sale of property since the *Jones* holding, as applied to property, under section 1982 had been foreshadowed by prior decisions, pp. 21-22, *supra*. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968).

A. *Jones* v. *Mayer* Should Be Given Prospective Application Only.

Limiting the overruling of prior case law to prospective application is a judicial technique employed with increasing frequency in both civil[49] and criminal cases.[50] As stated by the Third Circuit:

> Recent decisions of the Supreme Court in criminal cases have made it clear that the unrealistic theory that the law has always been what the latest case for the first time declares it to be, the so-called Blackstonian view, must yield to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 789 (3rd Cir. 1967), *rev'd on other grounds* 392 U.S. 481 (1968).

Even decisions on questions of constitutional law are applied prospectively only. In both *Linkletter* v. *Walker*, 381 U.S. 618, 636-37 (1965), and *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967), the Court denied retroactive effect to landmark constitutional decisions[51] after balancing three factors: a)

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49. *Great Northern Ry.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932); *McSparran* v. *Weist*, 402 F.2d 867 (3rd Cir. 1968). *Cf. Simpson* v. *Union Oil Co.*, 396 U.S. 13, 14 (1969); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968).

50. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). See also cases cited in *McSparran, supra*, fn. 49, at 877 (fn. 30). In *Linkletter*, the Court observed that in granting prospective effect only there is ". . . no distinction . . . between civil and criminal litigation." 381 U.S. at 627.

51. In *Linkletter*, the exclusionary rule regarding evidence seized in violation of the Fourth Amendment was denied retroactive effect in state courts. In *Stovall*, retroactivity was denied to the ruling that identification evidence obtained in the absence of the suspect's counsel violated the Fifth Amendment.

the purpose of the new law, b) the extent of reliance on the prior law, and c) the effect on the administration of justice of a retroactive application of the new law. Prior reliance and the effect on the administration of justice were of "overriding significance" in both cases and dictated the prospective application only of the new principles. *Stovall* v. *Denno*, 388 U.S. at 300-01.

If the drastic change of law which the Seventh Circuit found that *Jones* brought to all employment contracts is permitted to stand, the three criteria announced in *Linkletter* and *Stovall* weigh heavily in favor of denying *Jones* retroactive effect. The purpose of the *Jones* decision—to fulfill the promise of the Thirteenth Amendment[52]—would be well-served if racial discrimination in all employment contracts is prohibited from *Jones* forward since the effects of past discrimination could be quickly dissipated by private enforcement of the newly defined rights under section 1981.[53] With regard to reliance on prior law, approximately three-quarters of the nation's employers[54] who are not subject to Title VII would now be exposed to federal court suit for employment discrimination, if *Jones* is held to require the Seventh Circuit's construction of section 1981. Before *Jones*, the employers were entitled to rely on the uniform judicial interpretation that section 1981 does not

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52. 392 U.S. at 443.

53. For example, a black denied a job in 1966 would be able now to apply for employment with the assurance that the employer was aware that any black applicant denied a job because of race can file suit in federal court under section 1981. To allow suit for the 1966 refusal to hire would add nothing to the black's rights or the employer's duties.

54. See pp. 16-17, *supra*.

cover purely private contractual relationships.[55] To permit stale claims to be filed attacking events from the murky past involving the hiring or firing, and promoting or demoting of the country's nineteen million black citizens[56] is a harsh penalty for individuals who rightfully relied on existing law in exercising their freedom of association. Opening federal court doors to potentially vast numbers of such stale claims could only impede the administration of justice.[57]

Although each of the three criteria for deciding retroactivity favors limiting the *Jones* decision to prospective application, the Seventh Circuit ignored the criteria since it erroneously felt that *Jones* had already been applied retroactively in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Yet, retroactivity was not raised in *Sullivan*.[58] The plaintiffs in *Sullivan* had filed suit under section 1982 *prior* to the *Jones* decision[59] whereas respondents here sued

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55. The rights and duties of employers and unions subject to Title VII can at least be determined by reading the statute or consulting the Equal Employment Opportunity Commission. Employers and unions subject to Title VII know, for example, that charges of racial discrimination must be filed within a maximum of 210 days or are otherwise barred. 42 U.S.C. § 2000e-5(d) (1965). It would be grossly unfair to measure the conduct of employers and unions covered by Title VII by differing standards under section 1981.

56. Information Please Almanac, 624 (1968). This source states that in 1960 there were 18,871,000 blacks in Ameriea.

57. If the import of *Jones* is that section 1981 prohibits racial discrimination in all contractual relationships, the potential impact on the administration of justice would be overwhelming.

58. Retroactivity may not have been raised in *Sullivan* because it involved discrimination in the lease of real property and, as noted, pp. 21-22, *supra*, *Jones* did not necessarily announce a dramatic change in federal anti-discrimination law in regard to the transfer of property.

59. *Sullivan* was pending in the Supreme Court when *Jones* was decided. 392 U.S. 657 (1968).

after the new law was announced. It is sound judicial policy to give parties contending for a change in law the benefit of that change when it is made. Thus, the incentive of counsel to advance novel positions is preserved, while the risk of disturbing past transactions is eliminated. *Simpson* v. *Union Oil Co.*, 396 U.S. 13, 14 (1969); *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). On the other hand, "many cases involving litigation commenced *after* the date of an overruling decision have held that the overruling decision was not retroactively applicable to transactions or events which occurred prior to [that] time . . ."[60] So here, the *Jones* case decided in June 1968 should not govern refusals to hire occurring in 1966.

Whether a new federal remedy for employment discrimination created by *Jones* under section 1981 should be applied retroactively is thus an important federal question, wrongly decided by the Seventh Circuit, which should be settled by the Court.

B. The Court Should Establish Guidelines For The Limitations Period Applicable To Section 1981 Suits.

In the absence of a federal statute of limitations for actions under section 1981, the federal courts must first determine the nature of the claim and then apply the state limitations period applicable to that type of claim. *O'Sullivan* v. *Felix*; 233 U.S. 318, 322 (1914); *Beard* v. *Stephens*, 372 F.2d 685, 688 (5th Cir. 1967); *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir. 1961).[61] After

60. Annotation, "Prospective Or Retroactive Operation Of Overruling Decision," 10 A.L.R. 3d 1371, 1410 (1966). (emphasis added)

61. The use of state limitations provisions also is required by 28 U.S.C. § 1652 (1965) (Rules of Decision Act) and 42 U.S.C. § 1988 (1965).

paying lip service to this principle, the Seventh Circuit ignored both the principle and its own decisions requiring the application of the "statute of the forum state which governs the closest analogous action . . ." *Jones* v. *Jones*, 410 F.2d 365, 366 (7th Cir. 1969), *cert. denied* 396 U.S. 1013 (1970).

The "essential nature" of respondents' claim is employment discrimination and the closest analogous state action is the Illinois Fair Employment Practices Act (FEPA).[62] That Act allows 120 days in which to file discrimination claims. Since respondents' section 1981 suit was filed over two years after respondents were refused employment by Harvester, their claim was time-barred.

The Seventh Circuit erroneously refused to follow the FEPA limitation on the ground that it applies to an administrative remedy.[63] (App. B, p. 21b) Although the Court stated that a purpose behind the 120-day limitation was to facilitate conciliation (*Ibid.*), another purpose is to promptly resolve charges of employment discrimination. The Court of Appeals' fear that the 120-day limitation would unduly hamper the preparation of the private litigant's case under section 1981 (*Ibid.*) is unfounded since only the prompt filing of suit is required, after which the

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62. Ill. Rev. Stat. ch. 48, § 851 *et seq.* (1969). Section 853(a) of this Act provides in relevant part:

> "It is an unfair employment practice: (a) For any employer, because of the race, color, religion, national origin or ancestry of an individual to refuse to hire . . . or otherwise to discriminate against such individual . . ."

63. Yet the Illinois FEPA may be the basis of both administrative and judicial relief. *Centennial Laundry Co.* v. *West Side Org.*, 34 Ill.2d 257, 215 N.E.2d 443 (1966). In any event, filing periods applicable to state administrative remedies may govern analogous claims under the early Civil Rights Acts. *Williams* v. *Townsend*, 283 F. Supp. 580 (C.D. Cal. 1968).

parties may prepare their case through orderly discovery procedures.

The fundamental error of the Seventh Circuit was its failure to ascertain the state claim which is most analogous to respondents' section 1981 claim. The Court, instead, mechanically applied the five-year limitation for "civil actions not otherwise provided for," Ill. Rev. Stat. ch. 83, § 16 (1969). In addition to opposing this Court's opinion in *O'Sullivan*, and its own opinion in *Jones*, the Seventh Circuit's decision below also conflicts with the Fifth Circuit's decision in *Beard*, the Second Circuit's decision in *Moviecolor*, and decisions of the Third and Sixth Circuits.[64]

Along with the conflict created among the circuits, the statute of limitations ruling below is of considerable importance as a question of federal law. If the limitations period for employment discrimination claims under section 1981 parallels the limitations period for comparable state law claims, federal and state law would be harmonized and their common policy of prompt adjudication of these disputes observed.[65] The Seventh Circuit's ruling on the applicable statute of limitations therefore should be reviewed by this Court.

III. The Ruling Below Under Section 301(a) Ignores The Court's Decisions And Undermines Federal Labor Policy.

The Seventh Circuit held that if an employee "reasonably believes" that invoking exclusive contractual grievance pro-

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64. *Hileman* v. *Knable*, 391 F.2d 596 (3rd Cir. 1968); *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968); *Hughes* v. *Smith*, 389 F.2d 42 (3rd Cir. 1968); *Henig* v. *Odorioso*, 256 F. Supp. 276 (E.D.Pa. 1966), *aff'd* 385 F.2d 491 (3rd Cir. 1967).

65. Title VII, itself, requires the filing of charges within either 90 or 210 days, depending on whether resort first is had to state law remedies. 42 U.S.C. § 2000e-5(d) (1965).

cedures would be "utterly futile", he need not even attempt to exhaust that remedy before suing for breach of the collective bargaining agreement under section 301(a) of the Labor-Management Relations Act.[66] (App. B, p. 24b) The only authority cited for this holding are two decisions under the Railway Labor Act.[67] The Seventh Circuit's decision is squarely at odds with every decision of the Court which has construed the exhaustion of remedies requirement under section 301(a).

The *Steelworkers Trilogy*[68] declared that the policy of section 301(a) is to resolve employee disputes through the grievance and arbitration procedures established in collective bargaining agreements.

> The present federal policy is to promote industrial stabilization through the collective bargaining agreement . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.
>
> * * *
>
> A collective bargaining agreement is an effort to erect

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66. Section 301(a), 29 U.S.C. § 185(a) (1965), provides in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations, may be brought in any district court of the United States . . ."

67. *Czosek* v. *O'Mara*, 38 U.S.L.W. 4151 (Feb. 24, 1970); *Glover* v. *St. Louis-S.F. Ry.*, 393 U.S. 324 (1969). These decisions are part of a line of cases holding that administrative and intra-union remedies for racial discrimination by unions subject to the Railway Labor Act are inadequate. Under that Act, access to the courts is essential to obtain review for breach of the union's duty of fair representation. *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 207 (1944).

68. *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960).

> a system of industrial self-government. . . . But the *grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.* Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. *The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. at 578, 580-81. (emphasis added)

To implement this policy, the Court has consistently ruled that at least an *attempt* to use exclusive grievance machinery is a jurisdictional prerequisite to an employee's claim under section 301(a).

In *Vaca* v. *Sipes,* 386 U.S. 171, 184 (1967), the Court observed that, if exclusive contractual grievance procedures are not first exhausted by the employee, "the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted." The employer, therefore, may insist that employees pursue the exclusive contractual remedy. The only exception to the rule requiring exhaustion of that remedy before suing under section 301(a) is the situation in which the union unfairly represents the employee in the handling of the grievance.[69] Even then, *Vaca* holds that an employee's *attempt* to invoke the grievance process is essential

69. In *Vaca*, the plaintiff had pursued his grievance into the fourth step of the procedure when the union decided not to submit the grievance to arbitration, the final step, because of insufficient evidence.

to federal court jurisdiction under section 301(a):

> . . . [T]he wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, *provided* the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. 386 U.S. at 186.

Where the employer and union have made the grievance procedure exclusive and the union handles the grievance fairly, the employee is bound by the result and cannot sue under section 301(a).[70] 386 U.S. at 192, 194-95. See *Humphrey* v. *Moore*, 375 U.S. 335, 351 (1964); *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. at 596, 599 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. at 568.

In other decisions under section 301(a), the Court has required at least an attempt to pursue exclusive grievance procedures. In *Humphrey* v. *Moore*, 375 U.S. 335 (1964), federal jurisdiction existed under section 301(a) because the plaintiff employee claimed the union violated its duty of fair representation by settling his grievance at the second step of a three-step grievance procedure. See *Vaca* v. *Sipes*, 386 U.S. at 187. In contrast, federal jurisdiction was found lacking in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), in which the plaintiff had "made no effort to utilize" an exclusive three-step grievance procedure. 379 U.S. at 651. The Court there held that the 301(a) suit had to be

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70. Before any employee may sue his employer under section 301(a), he "must prove not only that he attempted to exhaust his contractual remedies, but that his attempt to exhaust them was frustrated by 'arbitrary, discriminatory, or . . . bad faith' conduct on the part of his union." 386 U.S. 171, 203-04 (J. Black dissenting and referring to p. 190 of majority opinion).

dismissed because "the employee must afford the union *the opportunity* to act on his behalf."[71] 379 U.S. at 653. (emphasis added)

Permitting the employee to bypass exclusive grievance procedures in favor of a lawsuit whenever he "reasonably believes" that resort to arbitration would be futile undermines the policy of section 301(a).[72] Such a loophole would detract from the "desirability" of using exclusive grievance procedures as a method of settlement and "'would inevitably exert a disruptive influence from the negotiation and administration of collective bargaining agreements.'" *Republic Steel Corp.* v. *Maddox*, 379 U.S. at 653. The Seventh Circuit's holding facilitates an employee's avoidance of the grievance process since a court would have before it only general evidence of largely irrelevant past relations between the plaintiff employee and his union.[73]

Instead of frustrating section 301(a), the requirement that an attempt be made to initiate exclusive grievance procedures insures that collective bargaining agreements will be fully but fairly enforced. The determination of whether the federal court should exercise jurisdiction can

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71. Other courts of appeals have held that exhaustion of contractual remedies must be attempted before recourse to the courts. *Ford* v. *General Electric Co.*, 395 F.2d 157 (7th Cir. 1968); *Bsharah* v. *Ellra-Coxp.*, 394 F.2d 502 (6th Cir. 1968); *Rothlein* v. *Armour & Co.*, 391 F.2d 574 (3rd Cir. 1968); *Desrosiers* v. *American Cyanamid Co.*, 377 F.2d 864 (2nd Cir. 1967).

72. In the present case, respondents made no effort to pursue the no-strike grievance procedure which is the exclusive remedy for all disputes between Harvester and its bricklayers. (R. 29, 86-88) This procedure requires the individual union member to confer with the foreman (first step) and then to request union representation (second step).

73. See the conclusory allegations made by the respondents in this case. (R. 235, 238) (App. B, p. 23b).

then be based on the more objective evidence of how the union handled the particular grievance in dispute.

Review of the Seventh Circuit's section 301(a) holding is essential to conform that decision to this Court's teachings and to insure that the congressional policy of encouraging "collective bargaining and . . . administrative techniques for the peaceful resolution of industrial disputes" is enforced. *The Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770,* 38 U.S.L.W. 4462, 4466 (June 1, 1970).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HAMMOND E. CHAFFETZ
THOMAS M. THOMAS
GEORGE D. NEWTON, JR.
THOMAS A. GOTTSCHALK
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
130 East Randolph Drive
Chicago, Illinois 60601
Attorneys for Petitioner,
International Harvester
Company

July 27, 1970

APPENDIX "A".

Opinion Of The United States District Court For The Northern District Of Illinois, Eastern Division.

WILLIAM WATERS AND DONALD SAMUELS, *Plaintiffs* vs. WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, AND UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Defendants*. No. 68 C 2483. JULY 14, 1969. THE HONORABLE EDWIN A. ROBSON, District Judge.

The defendants in this class action have moved to dismiss or, in the alternative, for summary judgment. The Equal Employment Opportunity Commission (EEOC) requested and was granted leave to file a brief as a friend of the court. For the reasons set forth below, this court is of the opinion that the motions to dismiss should be granted.

Plaintiff William Waters, a Negro bricklayer, was a probationary employee of the defendant Wisconsin Steel Works of International Harvester Company (Company) from July 13, 1964, to September 11, 1964, and from March 20, 1967, to May 19, 1967. He was offered a position again on August 30 or 31, 1967, but he declined the offer. On September 16, 1964, Waters filed a complaint against the Company with the President's Committee on Equal Employment Opportunity. The complaint was dismissed on March 1, 1965. Plaintiff Donald Samuels, also a Negro bricklayer, has never been employed by the Company, but on April 3, 1966, he submitted an application for employment. On May 20, 1966, the plaintiffs filed charges against the Company with the Illinois Fair Employment Practices Commission (FEPC), alleging that the Company had discriminated against them. The Illinois FEPC dismissed

these charges on August 17, 1966, for lack of substantial evidence. In accordance with Title VII of the 1964 Civil Rights Act, the plaintiffs filed charges with the EEOC against the Company within 30 days after the dismissal by the Illinois FEPC. 42 U.S.C. § 2000e et seq. On February 16, 1967, the EEOC found that there existed no reasonable cause to believe that the Company had violated Title VII. On June 14, 1967, the EEOC granted plaintiff Waters' request for reconsideration. The EEOC, on July 10, 1968, withdrew its previous "no cause" finding and issued a new decision that the Company had violated Title VII of the 1964 Civil Rights Act by a discriminatory recall of three white bricklayers in June and July, 1966, and January, 1967. The EEOC notified the plaintiffs that its conciliation efforts with the Company had been fruitless and advised them to proceed in a federal district court.

The plaintiffs filed the instant complaint in this court on December 27, 1968, against both the Company and Local 21 of the United Order of American Bricklayers and Stone Masons (Union).[1] The plaintiffs here allege that the defendants practice a racially discriminatory seniority system. Three statutes are invoked by the plaintiffs to support this court's jurisdiction: Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., and Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Each of these statutes will be treated in turn.[2]

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1. Both plaintiffs were at one time members of the defendant Union.

2. The plaintiffs have withdrawn their argument that the National Labor Relations Act, 29 U.S.C. § 151 et seq., also supports this court's jurisdiction, since exclusive jurisdiction under that act is vested in the National Labor Relations Board.

THE CIVIL RIGHTS ACT OF 1866

Section 1 of the Civil Rights Act of 1866 provides that

> "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981.

The question whether state action must be alleged to sustain a claim under Section 1981 is presently unsettled. Prior to the Supreme Court's decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), a showing of state action was vital to such a claim. E.g., Civil Rights Cases (United States v. Stanley, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883)); Hurd v. Hodge, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187 (1948). In *Jones, supra,* it was first held that Section 1982, barring discriminatory practices in real estate dealings, applied to private as well as state action. The *Jones* decision was foreshadowed by earlier decisions which prohibited racial restrictions on the sale of property, Hurd v. Hodge, *supra;* Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917). There is no similar trend of decisions applying the provision under consideration here, Section 1981, to the actions of private parties. The likelihood that the Supreme Court will not extend Section 1981 to private employment contracts is evidenced by the enactment of Title VII of the Civil Rights Act of 1964. Title VII expressly forbids racial discrimination in hiring by private employers and provides more definite remedies that would

be available even if Section 1981 were made applicable to private action. By providing such complete relief under Title VII, Congress did not anticipate the development of a then nonexistent and redundant remedy under Section 1981. An expansionist interpretation of Section 1981 would add little to the protection of private employment contracts from racial discrimination that is not already available under Title VII and would ignore the apparent congressional intent that Title VII be the exclusive enforcement procedure against discrimination in employment contracts. To now apply Section 1981 unnecessarily to employment contracts would create a body of law independent from and in potential conflict with the detailed congressional scheme regulating employment embodied in Title VII. Therefore, this court concludes that it does not have jurisdiction over this matter by reason of the Civil Rights Act of 1866.

This court observes, however, that even if it did have such jurisdiction, the action would be barred as untimely. Federal courts are required to apply to suits under Section 1981 the limitation period applicable to the most analogous claim under state law. Hileman v. Knable, 391 F.2d 596 (3rd Cir. 1968); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968); Jones v. Jones, 410 F.2d 365 (7th Cir. March 5, 1969). An action alleging discriminatory employment practices under Section 1981 is most analogous to a claim under the Illinois Fair Employment Practices Act, which contains a mandatory 120-day filing period.[3] Ill.Rev.Stat. 1967, ch.

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3. Filing periods which are conditions precedent to suit are often referred to as statutes of limitation. For example, the limitation period in the Federal Employers' Liability Act is referred to as a statute of limitations even though it is a condition precedent to recovery. Wabash Ry. Co. v. Bridal, 94 F.2d 117, 121 (8th Cir. 1938). See also Carpenter v. Erie R. Co., 132 F.2d 362 (3rd Cir. 1942); Reat v. Illinois Cent. R. R. Co., 47 Ill. App.2d 267, 197 N.E.2d 860 (1964).

48, § 858. Indeed, the plaintiffs here previously filed charges concerning the subject matter of this complaint with the Illinois FEPC. The practices complained of occurred on specific dates during the years of 1964, 1966 and 1967. The complaint was filed on December 27, 1968. Therefore, even if this court had Section 1981 jurisdiction, the claim would be barred.

THE CIVIL RIGHTS ACT OF 1964

The Union has moved to dismiss the complaint insofar as it asserts Title VII of the 1964 Civil Rights Act as the basis of this court's jurisdiction, on the ground that the Union was not named in the underlying charge before the EEOC. The Company, named in the EEOC charge, agrees and moves to dismiss for failure to join an indispensable party under Rule 19, Federal Rules of Civil Procedure.

In their claim under Title VII, the plaintiffs seek injunctive relief against both the Company and the Union to prohibit enforcement of existing seniority provisions in their collective bargaining agreement, to require publication by both defendants of job openings, to "restructure" the existing seniority system established by their collective bargaining agreement, and to give the plaintiffs seniority over all other bricklayers hired since the date of the alleged acts of discrimination. Under such circumstances, both the Union and the individual bricklayers whose seniority might be adversely affected must be before the court. Title VII provides that "a civil action may * * * be brought against the respondent named in the charge * * * by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(e). A party not brought before the EEOC, such as the Union here, cannot be sued in a Title VII action in a federal court. Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Freese v. John Morrell & Co., CCH Empl.Prac. ¶ 9231 (60

Lab.Cas.) (S.D. Iowa 1966). In *Miller*, the court expressly held that

> [t]his circuit has already made clear—as we have reiterated in this opinion—that charging parties cannot bypass the EEOC. Therefore, *if charges of employment discrimination have not been filed against the union, the appellants' [plaintiffs'] right to file suit against the union has not ripened.* 408 F.2d at 291. (Emphasis supplied.)

Therefore, this court finds that joinder of the Union as a party to the proceeding brought by the plaintiffs before the EEOC is a condition precedent to joining the Union in the present case. The plaintiffs having failed to do so require dismissal of the Title VII claim against the Union. Consequently, the plaintiffs' claim against the Company must also be dismissed because the Union and the bricklayers who would be adversely affected in this case are parties "needed for just adjudication" under Rule 19.

THE LABOR MANAGEMENT RELATIONS ACT

The complaint alleges that the plaintiffs were injured by a "direct violation" of the collective bargaining agreement between the Company and the Union, in violation of Section 301(a) of the Labor Management Relations Act. A prerequisite to suit under Section 301(a) is that an employee at least attempt to exhaust exclusive grievance and arbitration procedures established in the bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); Ford v. General Electric Co., 395 F.2d 157 (7th Cir. 1968). The plaintiffs have not even attempted to follow the grievance procedures established by the contract. They have not filed a grievance with the Company, nor have they demanded that the Union

represent them in any grievance procedure. The complaint is therefore fatally defective under Section 301(a) since it does not contain an allegation that a formal effort to pursue contractual or administrative remedies would be "absolutely futile." Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324, 331, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969).

It is therefore ordered that the defendants' motions to dismiss be, and they are hereby granted, and the cause is hereby dismissed.

APPENDIX "B".

Opinion of the United States Court of Appeals for the Seventh Circuit.

WILLIAM WATERS AND DONALD SAMUELS, *Plaintiffs-Appellants* vs. WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, AND UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Defendants-Appellees*, April 28, 1970.

Before SWYGERT, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and FAIRCHILD, *Circuit Judge*.

SWYGERT, *Chief Judge*. This appeal raises important questions concerning the availability and scope of various federal remedies for combating racial discrimination in employment. Plaintiffs, William Waters and Donald Samuels, brought a class action seeking damages and injunctive relief against the Wisconsin Steel Works of International Harvester Company and Local 21, United Order of American Bricklayers and Stone Masons. They alleged that Harvester, with the assistance of Local 21, maintained a discriminatory hiring policy designed to exclude Negroes, including the plaintiffs, from employment as bricklayers at Wisconsin Steel Works. Plaintiffs claimed that these allegations of racial discrimination stated a cause of action under four separate statutes: section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to e-15; section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a); and the National Labor Relations Act, 29 U.S.C. §§ 151 to 167.[1] On the motion of defendants the district

1. Plaintiffs withdrew their claim under the National Labor Relations Act in the district court. Although the allegation of jurisdiction under that provision has not been stricken from the complaint, it was not reasserted on appeal. We, therefore, deem it to be waived. *See* III-B, *infra*.

court dismissed plaintiffs' complaint. The plaintiffs appeal from the order of dismissal. We reverse and remand for trial.

In this appeal we must determine whether plaintiffs have stated a cause of action under any of the statutory grounds cited in their complaint. We treat the district court's dismissal of the complaint as a summary judgment for the defendants and consider the affidavits presented in the district court to supplement the bare allegations of the complaint.[2]

The facts as alleged in the complaint and supplemented by affidavits are not in material dispute. Harvester employs over forty-five hundred persons at Wisconsin Steel Works in Chicago, including a small force of bricklayers (less than fifty men). Local 21 is the exclusive bargaining representative for the bricklayers employed by Harvester.

The complaint alleges that prior to June 1964 Harvester, with the acquiescence of Local 21, mantained a discriminatory hiring policy which excluded Negroes from employment as bricklayers. During June 1964 five Negroes, including William Waters, were hired as bricklayers. Waters, a member of Local 21, worked in that capacity from June 13, 1964 until he was laid off on September 11, 1964. Nine other bricklayers including all of the Negroes hired in June were discharged at that time.

Under the collective bargaining agreement workers

2. The district court's order of dismissal was not denominated as a summary judgment for the defendants. Nevertheless, affidavits were submitted by both sides and were not excluded by the court. From its memorandum opinion it is evident that the district court considered these affidavits. Moreover, all parties have relied on affidavits to some extent in this appeal. See FED.R.CIV.P. 12(c).

achieve seniority only after ninety consecutive days on the job. Thus all of the Negro bricklayers hired in June 1964 worked as probationary employees and did not acquire seniority and the accompanying right to preferential reinstatement when bricklayer jobs were again available. Plaintiffs allege that this seniority system, agreed to by Local 21, is part of a systematic attempt to exclude Negroes from employment as bricklayers.

In April 1966 Waters sought but was not offered reemployment with Harvester. At the same time, Donald Samuels, a member of Local 21, also applied for employment with Harvester as a bricklayer. Samuels, who had not previously worked for Harvester, was denied employment.

On May 20, 1966 Waters and Samuels filed charges with the Illinois Fair Employment Practices Commission alleging that Harvester refused to hire them as bricklayers on account of their race. Three days later the same charges were filed with the Equal Employment Opportunity Commission. On February 16, 1967 the EEOC found that no reasonable cause existed to believe that Harvester violated Title VII of the Civil Rights Act.[3]

In March 1967 plaintiff Waters petitioned for reconsideration of the EEOC's finding and provided the following additional allegations to support his request. In September 1965 a number of white bricklayers on layoff status elected to receive severance payments. By accepting sever-

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3. On March 8, 1967 Waters and the other bricklayers discharged in September 1964 were offered reemployment. Believing that he had been unsuccessful in his action before the EEOC, Waters accepted employment and worked as a bricklayer from March 20 until May 19, 1967 when he was again discharged. In August 1967 he was again offered employment by Harvester but refused since his petition for reconsideration was then pending before the EEOC.

ance pay under the collective bargaining agreement these bricklayers lost all rights to preferential reinstatement and became eligible for reemployment on the same basis as new employees. Subsequently, on June 15, 1966 Harvester and Local 21 amended their collective bargaining agreement to restore seniority to eight white bricklayers whose seniority had been lost after receiving severance pay. Three of these bricklayers were offered and accepted employment. Restoration of seniority to the remaining five workers relegated plaintiffs to a list further away from recall. As a result plaintiffs alleged that their applications for employment were not given equal consideration and that reemployment of the three white workers and restoration of seniority to all eight bricklayers perpetuated Harvester's continuing policy of hiring only white bricklayers.

On June 14, 1967 the EEOC granted Waters' request for reconsideration. On July 10, 1968 the EEOC withdrew its previous decision and issued a new finding that "reasonable cause exists to believe that respondent [Harvester] violated Title VII of the Civil Rights Act of 1964. . . ." On November 29, 1968 the EEOC notified Waters and Samuels that its conciliation efforts with Harvester had failed and provided them with notice of their right to sue.

On December 27, 1968 plaintiffs filed their complaint in the district court against Harvester and Local 21. The district court gave numerous grounds for dismissing the complaint. The court held that the Supreme Court's holding in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), could not be extended to create a cause of action for "private" racial discrimination in employment under 42 U.S.C. § 1981. The court further held that even if such a cause of action existed prior to 1964, it was, nevertheless, preempted by the enactment of Title VII of the 1964 Civil Rights Act. Furthermore, the court concluded that any

action under section 1981 would be barred by the 120-day filing period of the Illinois Fair Employment Practices Act.

The district court disposed of plaintiffs' Title VII count against Local 21 by holding, pursuant to section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), that Local 21 could not be joined as a defendant since plaintiffs had not previously charged the union with discriminatory practices in a proceeding before the EEOC. The court further held the action against Harvester should also be dismissed since Local 21 and individual white bricklayers could be adversely affected if plaintiffs' action continued, thereby making Local 21 and the bricklayers, parties "needed for just adjudication" under Rule 19, Federal Rules of Civil Procedure.

Finally, the court held that the failure of plaintiffs to exhaust the grievance and arbitration procedures under the contract precluded suit under section 301(a) of the Labor-Management Relations Act. In a footnote the court also stated that plaintiffs failed to state a cause of action under the National Labor Relations Act, since exclusive jurisdiction under that Act is vested in the National Labor Relations Board.

The central issue in this appeal is whether Local 21 can be sued directly in the district court without previously being charged before the EEOC. If Local 21 is properly a defendant, full relief can be granted and the applicability of Rule 19, FED.R.CIV.P. need not be considered. We hold that a right to sue under section 1981 for "private" racial discrimination in employment existed prior to 1964. By enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal this right to sue. However, in order to avoid irreconcilable conflicts between the provisions of section 1981 and Title VII, a plaintiff must exhaust his administrative remedies before the EEOC unless he provides a reasonable excuse for his failure to do so. Since we find on the

basis of the material before us that plaintiffs have sufficiently justified their failure to charge Local 21 before the EEOC, we hold that the district court erred in dismissing plaintiffs' complaint against the union. Accordingly, we reverse for trial on the merits of plaintiffs' complaint against Local 21 under section 1981 and against Harvester under Title VII.

I. The Existence of a Right to Sue Under Section 1981:

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court was asked to determine the scope and constitutionality of 42 U.S.C. § 1982.[4] In its original form section 1982 was part of section 1 of the Civil Rights Act of 1866.[5] The Court held that section 1 and its derivative, sec-

4. 42 U.S.C. § 1982 reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

5. Section 1 of the Civil Rights Act of 1866 provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

tion 1982, prohibit "*all* racial discrimination, private as well as public, in the sale or rental of property. . . ." *Jones, supra,* at 413. The constitutionality of section 1982 was upheld on the basis of Congress' power to enact legislation to enforce the thirteenth amendment.[6]

Plaintiffs argue by analogy to the *Jones* case that 42 U.S.C. § 1981[7] is also derived from section 1 of the Civil Rights Act of 1866; that it is a valid exercise of congressional power under the thirteenth amendment; and that it is intended to prohibit private racial discrimination in employment by companies and unions. We agree.

There can be little doubt that section 1981, as well as section 1982, is derived directly from section 1 of the 1866 Civil Rights Act. In this judgment we rest primarily on the views expressed by the Supreme Court in the *Jones* case. In footnote 78 the Court said that "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981 (. . . derived from § 1 of the Civil Rights Act of 1866. . . .)"

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6. The thirteenth amendment provides:

Section 1:

Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2:

Congress shall have power to enforce this article by appropriate legislation.

7. 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Jones, supra, at 442. This statement is buttressed by further mention of the derivation of section 1981 in footnote 28, *Jones, supra*, at 422.

The Supreme Court's view of the genesis of section 1981 is also supported by our own analysis. In 1870 Congress reenacted section 1 of the 1866 Act as section 18 of the 1870 Civil Rights Act. As part of the 1870 Act Congress also adopted section 16 which is similar, although somewhat broader, than section 1 of the 1866 Act. For purposes of determining the derivation of section 1981 we believe the enactment of section 16 of the 1870 Act is superfluous since section 18 is sufficiently broad to include the provisions of section 1981. This conclusion is supported by the failure of defendants to present legislative history to demonstrate that Congress intended to narrow the scope of the right "to make and enforce contracts" provision of section 1 of the 1866 Act by the enactment of section 16. In fact, a contrary intent is more likely since Congress by enacting section 16 undoubtedly was attempting to insure that the right to make and enforce contracts without regard to race was supported by the fourteenth as well as the thirteenth amendment.[8]

From the discussion in the *Jones* case, it is also evident that section 1981, as part of section 1 of the 1866 Act, was a valid exercise of Congress' power to enact legislation under the thirteenth amendment. We rest particularly upon the Supreme Court's analysis of *Hodges* v. *United States*, 203 U.S. 1 (1906). In *Hodges* a group of white workers were prosecuted under section 1981 for terrorist activities conducted against Negro employees of a saw mill. The Supreme Court reversed the defendants' conviction, holding that section 1981 was not designed to prohibit private acts of dis-

8. The fourteenth amendment was not adopted until 1868.

crimination. The Court in *Jones* examined the decision in *Hodges* and ruled:

> The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled. *Jones, supra,* at 442-43 n. 78.[9]

Every indicia of congressional intent points to the conclusion that section 1981 was designed to prohibit private job discrimination. The words of the statute, which are almost identical in relevant respects to section 1982, must be construed to extend beyond insuring the bare legal capacity of Negroes to enter into contracts. Thus Congress provided that: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." We are not persuaded that the failure of Congress to expressly mention employment contracts makes section 1981 distinguishable from section 1982. This conclusion is supported by the legislative history of the 1866 Act which demonstrates Congress' intent that section 1 apply to employment contracts. As the Supreme Court noted in Jones:

> The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters. *Jones, supra,* at 427.

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9. *See generally* A. Larson, NEW LAW OF RACE RELATIONS, 1969 WIS.L.REV. 470.

As an example of Congress' concern are the words of Representative Windom delivered on the floor of the House:

> Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil. *Cong. Globe; 39th Cong. 1st Sess.* 1159 (1866).

This explanation of the purpose of section 1 of the 1866 Act demonstrates that Congress contemplated a prohibition of racial discrimination in employment which would extend beyond state action.

Racial discrimination in employment by unions as well as by employers is barred by section 1981. The relationship between an employee and a union is essentially one of contract. Accordingly, in the performance of its functions as agent for the employees a union cannot discriminate against some of its members on the basis of race.[10] *Washington* v. *Baugh Construction Co.*, 61 LC ¶ 9346 at 6908 (W.D.Wash. 1969); *Dobbins* v. *Local 212, IBEW*, 292 F.Supp. 413 (S.D. Ohio 1968).

Defendants make several arguments to refute the existence of a cause of action based on private racial discrimination in employment prior to the enactment of Title VII of the 1964 Civil Rights Act. These arguments merit only brief discussion. Defendants maintain that the *Jones* decision was "foreshadowed" by cases such as *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Buchanan* v. *Warley*, 245 U.S. 60 (1917), and that, since similar "foreshadowing" is not present under section 1981,

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10. We need not decide whether an employee posesses rights under § 1981 against the union if he is not a member. *See Steele* v. *Louisville & N. R.R. Co.*, 323 U.S. 192, 198-99 (1944).

the Supreme Court would not extend its ruling in *Jones* to private discrimination in employment contracts. If, by foreshadowing, the defendants mean that the state action concept has sometimes been employed in a flexible fashion to achieve just results, the cases upon which they rely foreshadow the demise of the requirement of state action under section 1981 as well. Furthermore, it is mistaken to suggest that courts have not used similar means to circumvent the requirement of state action in the area of employment contracts. *See Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198-99 (1944).

Defendants also argue that the *Jones* case is distinguishable from the case at bar since property rights have traditionally been subject to greater governmental regulation than other private activity. We disagree. Labor contract relations are subject to governmental regulation nearly as extensive as property rights. Furthermore, we are unclear why defendants' assertion, even if it were true, is relevant in construing section 1981. Finally, defendants maintain that the *Jones* case should be given retroactive application. This argument is sufficiently answered by the fact that the Supreme Court has already applied the *Jones* case retroactively in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

II. Title VII of the Civil Rights Act of 1964

A. *Did Title VII repeal section 1981 by implication?*

Having established the existence of a cause of action under section 1981 prior to 1964, we must now ascertain whether Congress, by the enactment of Title VII, intended to repeal the right to bring suit for racial discrimination

in employment under the former section. The rules governing this determination have been stated by the Supreme Court in *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936):

> The amending act just described contains no words of repeal; and if it effected a repeal of §25 of the 1913 act, it did so by implication only. The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute; it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

We need concern ourselves only with the doctrine of repeal by implication since Title VII does not provide for express repeal of previous legislation. Furthermore, the second category of repeal by implication noted by the Supreme Court is inapplicable since section 1981 covers rights other than the right to contract for employment.

Defendants argue that Title VII was intended by Congress to be a comprehensive scheme to eliminate racial discrimination in employment thereby automatically abolishing all rights previously existing under section 1981. They point first to the fact that Congress in enacting Title VII was unaware of the possibility that aggrieved

persons could bring civil suits under section 1981.[11] They would distinguish the *Jones* case on this basis since the availability of section 1982 was mentioned in debate over Title VIII of the 1968 Civil Rights Act. *Jones, Supra*, at 413-17. After the recent decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), this argument is no longer viable. In *Sullivan* the Supreme Court held that the right to bring suit under section 1982 was unaffected by the enactment of the Public Accommodations provision of the 1954 Civil Rights Act, even though the legislative history of that Act fails to mention section 1982. *Sullivan, supra*, at 237. Thus the relevant question for the purpose of determining whether rights under section 1981 were repealed by implication is not whether Congress was aware of section 1981, but whether the legislative history demonstrates that Congress would have intended repeal if it had been aware of preexisting rights under the 1866 Civil Rights Act.

Contrary to the assertions of defendants, the legislative history of Title VII strongly demonstrates an intent to preserve previously existing causes of action. Thus Congress rejected by more than a two-to-one margin an amendment by Senator Tower to exclude agencies other than the EEOC from dealing with practices covered by Title VII.

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11. They rely especially upon the following statements by Congressman Lindsay:

> The situation in the law as it exists today, without the bill before us having passed, is that any individual can bring an action to invoke the protection of the 14th amendment with respect to a deprivation of a constitutionally protected right.
>
> In other words, if there is a custom or usage . . . or if there is a practice which has the force of State power behind it, which has State involvement in it, then today an individual may bring action for an injunction. 110 *Cong. Rec.* 1966 (1964).

110 *Cong. Rec.* 13650-52 (1964). Courts have accordingly held that Title VII does not preempt the jurisdiction of the National Labor Relations Board to hear charges of unfair labor practices based on the union's duty of fair representation. *United Packinghouse, Food & Allied Workers International Union* v. *NLRB*, ... F.2d .... (D.C. Cir 1969); *Local 12, United Rubber Workers* v. *NLRB*, 368 F.2d 12 (5th Cir. 1966).

Defendants argue, however, that the most important indicia of intent are the provisions established in Title VII itself and that the existence of a cause of action under section 1981 would virtually destroy these provisions. In addition to the availability of immediate access to the courts, they point to large differences in the class of persons covered by Title VII and section 1981 and variations in the substantive prohibitions of the two enactments. We agree that the difficulties in reconciling section 1981 and Title VII are great and that the areas of possible conflict are numerous. Nevertheless, the *Posadas* case cautions that "the intention . . . to repeal must be clear and manifest" and holds that "effect should be given to both if possible." Thus we cannot conclude that the possibility of conflict demonstrates that section 1981 was wholly repealed by implication.[12] We are convinced that the two acts can, in large measure, be reconciled and effect given to the congressional intent in both enactments. Therefore, we hold that conflicts must be resolved on a case-by-case basis.[13] Accordingly, we turn

12. *See generally* Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U.Chi.L.Rev. 615 (1969).

13. We intimate no views concerning the numerous conflicts between § 1981 and Title VII cited by Local 21 and confine our analysis solely to resolution of those conflicts which are before us in this case.

to section 706 (e)[14] to determine whether plaintiffs' cause of action under section 1981 against Local 21 can be reconciled with the "charged party" language of Title VII.

B. The effect of section 706(e) on the right to bring suit under section 1981.

Previously in construing section 706 (e) this court has held that: "It is a jurisdictional prerequisite to the filing of a suit under Title VII that a charge be filed with the EEOC against the party sought to be sued, 42 U.S.C. § 2000e-5(e)." *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (1969).

Other courts which have considered the question have also held that the "charged party" language of section 706(e) prohibits Title VII suits in the district court against persons not previously charged before the EEOC. *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Mickel* v. *South Carolina Employment Service*, 377 F.2d 239 (4th Cir.), *cert. denied*, 389 U.S. 877 (1967); *Butler* v. *Local 4, Laborers' Union*, 61 LC ¶ 9348 at 6917 (N.D.Ill. 1969); *Cox* v. *United States Gypsum Co.*, 284 F.Supp. 74 (N.D.Ind. 1968), *modified*, 409 F. 2d 289 (7th Cir. 1969); *Sokolowski* v. *Swift & Co.*, 286 F.Supp. 775 (D.Minn. 1968); *Monday* v. *Crown Zellerbach Corp.*, 271 F.Supp. 258 (E.D.La. 1967); *Moody* v. *Albemarle Paper Co.*, 271 F.Supp. 27 (E.D.N.C. 1967). Since these courts were not presented with arguments concerning the existence

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14. 42 U.S.C. § 2000e-5(e) provides in relevant part:

> If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to obtain voluntary compliance with this sub-chapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge . . . by the person claiming to be aggrieved.

of a right to sue under section 1981, the cases cited were properly decided. They do not hold, however, that failure to charge a party before the EEOC precludes suit under section 1981. We hold such suits can be reconciled with section 706 (e) and continue to exist in a limited class of cases.

The language of section 706(e) itself does not compel the conclusion that Congress intended to repeal the right to bring suit directly under section 1981. Even though that section, in discussing access to the courts, concentrates on the situation where an aggrieved party has first proceeded to the EEOC, there is no provision which specifically requires prior recourse before the Commission. Since Congress has expressly prohibited direct access to federal courts in similar situations under other statutes,[15] we hesitate to read section 706(e) as requiring recourse before the EEOC as a jurisdictional prerequisite in all cases.

Furthermore, the legislative history of Title VII fails to conclusively demonstrate that section 706(e) was designed to preclude civil suits by aggrieved parties without prior recourse before the EEOC. Although statements by members of Congress from the floor during debate should be viewed with caution,[16] we note the following assertion by Senator Humphrey, proponent and floor manager of the bill: "[T]he individual may proceed in his own right at any time. He may take his complaint to the Commission, he may by-pass

15. *See Age Discrimination in Employment Act of 1967*, 29 U.S.C. § 626(d), where a civil action by a private person is expressly prohibited unless the Secretary of Labor is given sixty days notice during which time he may attempt conciliation.

16. Contrary statements were made by opponents, including Senator Ervin who described the provisions of section 706(e) as follows: "[T]he bill puts the key to the courthouse door in the hands of the Commission." 110 *Cong. Rec.* 14 188 (1964).

the Commission, or he may go directly to court." 110 *Cong. Rec.* 14 188 (1964).

Despite these indications we are convinced that had Congress been aware of the existence of a cause of action under section 1981, the absolute right to sue under that section would have been modified.[17] Throughout the legislative history of Title VII, Congress expressed a strong preference for resolution of disputes by conciliation rather than court action. Conciliation was favored for many reasons. By establishing the EEOC Congress provided an inexpensive and uncomplicated remedy for aggrieved parties, most of whom were poor and unsophisticated. Conciliation also was designed to allow a respondent to rectify or explain his action without the public condemnation resulting from a more formal proceeding. Furthermore, the absence of direct government coercion was thought to lessen the antagonism between parties and to encourage reasonable settlement. The need for voluntary compliance was stressed since more coercive remedies were likely to inflame respondents and encourage them to employ subtle forms of discrimination.[18]

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17. Our conclusion is not inconsistent with the Supreme Court's holding in *Jones* that the right to proceed directly in federal court under § 1982 is unaffected by the enactment of Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §§ 3601 to 3619. This is true because § 812 of that Act provides an aggrieved party with the alternative of by-passing the Secretary of Housing and Urban Development altogether and proceeding directly in a civil action in the district court. Nor is our decision inconsistent with the Supreme Court's holding in *Sullivan* that § 1982 was unaffected by the enactment of Title II of the 1964 Civil Rights Act. Section 207(b) of that title contains an express clause saving prior legislation. *Sullivan, supra*, at 238.

18. *See generally M. Sovern*, Legal Restraints on Racial Discrimination in Employment (1966); Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968, 82 Harv. L. Rev. 834 (1969).

Because of the strong emphasis which Congress placed upon conciliation, we do not think that aggrieved persons should be allowed intentionally to by-pass the Commission without good reason. We hold, therefore, that an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies. We need not define the full scope of this exception here. Nevertheless, we believe that plaintiffs in the case at bar have presented allegations sufficient to justify their failure to charge Local 21 before the Commission.

We rely particularly on the following allegations. The primary charge of racial discrimination made by the plaintiffs is based on an amendment of the collective bargaining agreement between Harvester and Local 21. That amendment occurred in June 1966 *after* plaintiffs filed their charge before the EEOC. Until this amendment plaintiffs were, at least arguably, unaware of the participation of Local 21 in Harvester's alleged policy of racial discrimination. From the affidavits before us, it is evident that Local 21 was aware of the charges against Harvester, and by strong implication against itself, as early as October 1966.[19] Subse-

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19. We note especially the statements of James W. Quisenberry, an investigator for the EEOC, whose affidavit reads in pertinent part:

> In the regular performance of my official duties, pursuant to an investigation of charges filed May 23, 1966, by William Waters and Donald Samuels against the Wisconsin Steel Works, I twice contacted Edward T. Joyce, President of Local 21, United Order of American Bricklayers and Stone Masons. The first meeting occurred in October 1966; and the second meeting took place on August 8, 1967.
>
> In October, 1966, during my first meeting with Edward T. Joyce, I informed him fully of the nature of the charges made by William Waters and Donald Samuels. I informed Mr. Joyce that Waters and Samuels claimed that Wisconsin Steel Works had discriminatorily rejected their employment applications of April 3, 1966.

quent to this time Local 21 presumably could have rectified any acts of discrimination on its part. Thus Local 21 suffered only slight prejudice from the failure of plaintiffs to charge it before the EEOC.

It is inconceivable that Congress would have intended to do away with the right to sue directly under section 1981 in these circumstances. To do so would bind complainants by the four corners of an informal charge and defeat the effective enforcement of the policies underlying Title VII. *Cf. Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968). At the administrative stage the charge is usually drafted by laymen untrained in the law. A requirement that the complainant charge every person who may be involved in the alleged acts of discrimination would be unnecessarily harsh.[20] Nor do we believe that the aggrieved party is protected by the right to amend his charge since amendment procedures are generally beyond the competence of layman complainants.[21] To hold otherwise would be to deny effective relief intended by Congress solely on the basis of procedural defects before the Commission.

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20. The harshness of such a requirement is particularly evident in this case. If this action were dismissed against both Harvester and Local 21, plaintiffs would be forced to file new charges before the EEOC. Section 706(d) of Title VII requires that charges be filed with [sic] 210 days after the occurrence of the alleged unlawful employment practice. Unless the failure to hire plaintiffs in April 1966 were considered to be a continuing violation, new charges against Harvester and Local 21 would be deemed untimely and plaintiffs would be left without a remedy.

21. Defendants argue that the burden of amendment should be placed on Commission members under 42 U.S.C. § 2000e-5(a). We think the fact that the Commission did not attempt to amend plaintiffs' charge in this case demonstrates the inadequacy of such a remedy.

Allowing Local 21 to be sued directly in district court under section 1981 is consistent with the flexible interpretation of the requirement of conciliation recently given by other courts. Actual conciliation or even an attempt at conciliation by the EEOC no longer presents a jurisdictional barrier to filing suit in a district court. *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Johnson* v. *Seaboard Air Line R.R. Co.*, 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969). Moreover, courts have allowed complainants who have not been before the EEOC to join with complainants who have been before the agency as members of a class seeking relief against a common employer. *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969); *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir 1968); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). We think these cases demonstrate that the policy in favor of conciliation should not be transformed into a technical device used to obstruct the enforcement of prohibitions against racial discrimination in employment and to deny relief to those Congress has sought to protect.

The defendants make one final contention in arguing that the district court was correct in dismissing plaintiffs' claim against Local 21. They urge that plaintiffs' action under section 1981 is barred pursuant to 28 U.S.C. § 1652 and 42 U.S.C. § 1988 by the 120-day filing period for a discrimination claim under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48 § 851 *et seq.* (1967). We disagree. Under those sections the statute of limitations applicable to civil rights actions is controlled by the statute of limitations which governs the most analogous state action. *Jones* v. *Jones*, 410 F.2d 365 (7th Cir. 1969). We are not convinced

that the Illinois F.E.P.A. is the most analogous state action under these provisions. The Illinois act provides only for an administrative remedy and review of the F.E.P.C.'s findings in the state courts. Different considerations obviously apply to suits by private litigants in courts of law. In contrast to the Illinois F.E.P.A., the entire burden of investigating and developing a case under section 1981 lies with the private litigant. Furthermore, the short limitations period contained in the Illinois act is designed to encourage conciliation and private settlement. When an aggrieved party seeks court relief, conciliation has generally failed. Accordingly, the appropriate limitations period in this case is governed by our recent decision in *Baker* v. *F & F Investment* (No. 17815, Jan. 6, 1970). That case held that civil actions under section 1982 are subject to the five-year statute of limitations provided in Ill. Rev. Stat. ch 83 § 16 (1967), governing civil actions not otherwise provided for. Since we see no difference between section 1981 and section 1982 for purposes of determining the appropriate statute of limitations, plaintiffs' action against Local 21 was timely filed.

We hold that the district court erred in dismissing plaintiffs' complaint against Local 21. Since the relief available to plaintiffs under section 1981 is potentially as broad as that available in their action against Harvester under Title VII, *Sullivan* v. *Little Hunting Park, Inc.*, *supra*, at 238-40, we need not consider the district court's ruling concerning the applicability of Rule 19, FED.R.CIV.P.[22]

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22. Local 21 adequately represents the interests of absent bricklayers thereby refuting the argument that individual white bricklayers are indispensable parties. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969).

III. Breach of Contract and the Duty of Fair Representation

A. *Action against Harvester under section 301(a)*

Plaintiffs argue that the allegations of their complaint also state a cause of action against Harvester under section 301(a) of the Labor-Management Relations Act as well as under Title VII.[23] We think plaintiffs misconceive the scope and purpose of section 301(a). Nevertheless, these allegations, if liberally construed, are sufficient to withstand a motion to dismiss under that section. Accordingly, we hold that the district court erred in dismissing plaintiffs' action under section 301(a) and order that their cause of action against Harvester for breach of contract be reconsidered on remand of this case.

Section 301(a), unlike Title VII, is not designed primarily as a remedy for racial discrimination in employment. Instead, Congress enacted section 301(a) to provide a means by which collective bargaining agreements could be enforced in federal and state courts. Suits under section 301(a) require plaintiffs to allege specifically which provisions of the collective bargaining agreement have been violated by the employer. Plaintiffs' complaint alleges that the agreement amending the collective bargaining agreement entered into by Local 21 and Harvester in June 1966 violated the seniority provisions of the contract. Since parties to a labor contract are always free to amend their agreements, we do not see how an amendment through the ordinary processes of collective bargaining can be considered a breach of contract. *Humphrey v. Moore*, 375 U.S. 335, 359 (concurring opinion of Mr. Justice Harlan) (1964). Nevertheless, the complaint along with the accompanying affidavits of plain-

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23. Section 301(a), 29 U.S.C. § 185(a) (1965), provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations, may be brought in any district court of the United States.

tiff Waters, if broadly construed, may be read to include allegations that plaintiffs were treated in a discriminatory fashion by Harvester in violation of the contract between Local 21 and Harvester. This construction is sufficient to survive a motion to dismiss. *Czosek* v. *O'Mara*, 38 U.S.L.W. 4151 (Feb. 24, 1970); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). On remand plaintiffs should be permitted to amend their complaint to allege with greater specificity which provisions of the collective bargaining agreement were violated by Harvester.

To bring an action under section 301(a) an individual employee also must exhaust the grievance provisions of his collective bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). As the Supreme Court held in *Vaca* v. *Sipes*, 386 U.S. 171, 186 (1967):

> [T]he wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

In the instant case the affidavit of plaintiff Waters alleges in very general terms that any attempt to seek redress through the grievance mechanism of the contract would be futile.[24] Harvester argues that plaintiffs cannot prove a

24. Waters' affidavit includes the following statements:

> I have repeatedly called upon the union to represent me and to protect me against racial discrimination in employment.
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> Despite my complaints, the union has failed adequately and fairly to represent me in disputes with employers involving racial discrimination.
>
> • • •
>
> Because Nicholas Popovic is the official through whom I would have to channel any formal complaints . . . and because Local 21 has failed to change its policy of discriminating against black bricklayers, even after receiving numerous complaints from me, I believe that any further attempts to channel my grivances through the union would be futile.

breach of the duty of fair representation sufficient to satisfy the exhaustion requirement without at least attempting to put the grievance mechanisms into operation by a demand on union officials. We disagree. Although it may be difficult to establish such proof in this case, we can envision situations in which union representatives repeatedly have breached their duty of fair representation in previous dealings with an employee. In such cases the employee could reasonably believe that attempts to seek the aid of the union in presenting a grievance would be utterly futile, thus justifying his failure to exhaust remedies. *Cf. Glover* v. *St. Louis, San Francisco R.R. Co.*, 393 U.S. 324 (1969). As a result we are unable to say beyond a doubt that plaintiffs' allegations of futility are insufficient to excuse their failure to exhaust the grievance provisions of their contract. *Czosek* v. *O'Mara*, *supra*, slip opinion at 2-3. On remand of this case plaintiffs should be allowed to amend their complaint to allege circumstances supporting their assertion that attempts to persuade Local 21 to pursue their grievances would be futile.

B. Duty of fair representation action against Local 21

Plaintiffs assert that Local 21 violated its duty of fair representation by participating or at least acquiescing in Harvester's discriminatory hiring policies. They maintain that this breach of duty by Local 21 states a cause of action under section 301(a). Although plaintiffs again read section 301(a) too broadly, we believe that their complaint, if liberally construed, states a cause of action under that section. Therefore, on remand of this case the district court should reconsider plaintiffs' complaint against Local 21 under section 301(a).

Plaintiffs are incorrect in arguing that section 301(a) is intended to provide federal jurisdiction for suits seeking

relief for violation of the duty of fair representation, *Sciaraffa* v. *Oxford Paper Co.*, 62 LC ¶ 9396 at 6549 (S.D. Me. 1970). The origin of that duty is statutory, first recognized in cases involving racial discrimination by unions certified as exclusive bargaining agents under the Railway Labor Act. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1943); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 120 (1943). The Supreme Court subsequently held that the provisions of the National Labor Relations Act included a similar duty. *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955); *rev'g*, 223 F.2d 739 (5th Cir. 1955); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). Suits for breach of statutory duty may be brought under federal question or civil rights jurisdictional provisions. *Brady* v. *Trans World Airlines, Inc.*, 401 F.2d 87 (3d Cir. 1968); *Williams* v. *Pacific Maritime Assoc.*, 384 F.2d 935 (9th Cir. 1967).[25]

The duty of fair representation has only limited relevance to actions under section 301(a). A union can be joined as a defendant under that section, if by breach of its statutory duty, the union has prevented presentment or enforcement of an employee grievance under the collective

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25. We do not agree with the district court's conclusion that such suits can only be brought before the National Labor Relations Board. Although the NLRB has assumed jurisdiction and has held that breach of the duty of fair representation constitutes an unfair labor practice under § 8(b)(1)(A), *Miranda Fuel Co.*, 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); *Local 12, United Rubber Workers* v. *NLRB*, 368 F.2d 12 (5th Cir. 1966), the Supreme Court has held that the NLRB's jurisdiction is not exclusive. *Vaca* v. *Sipes*, *supra*, at 178-81. Since plaintiffs have waived their claim that their complaint states a cause of action under the National Labor Relations Act, see n. 1, *supra*, we need not consider the applicability of that Act to the allegations before us.

bargaining agreement.[26] *Vaca* v. *Sipes*, *supra*, at 197 n. 18. In such cases a plaintiff-employee can recover only for injury which flows solely from the union's own conduct. As a result plaintiff's recovery against the union is limited in most cases to compensation for the union's failure to timely assert an employee grievance against an employer, *Vaca* v. *Sipes*, *supra*, at 196-98. When viewed in a light most favorable to plaintiffs, we think their complaint makes such an allegation. Accordingly, plaintiffs' cause of action against the union under section 301(a) should be considered on remand.

For the reasons stated, the judgment of the district court is reversed and the cause remanded.

FAIRCHILD, *Circuit Judge* (concurring). I concur in reversal and remand for further proceedings against both defendants. I have reached conclusions which differ in some respects from those set forth in Chief Judge Swygert's majority opinion. They are as follows:

(1) *Plaintiffs' right to proceed against Harvester under Title VII.* Plaintiffs allege that Harvester, as an employer, is engaging in what Congress declared an unlawful employment practice. Congress authorized an action for the prevention and redress of such practice, but did not suggest that all parties responsible for the practice or all parties whose interests might be affected by its termination must

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26. Unions also can be joined as defendants if the union is a moving force in producing a violation of the contract by the employer, *Vaca* v. *Sipes*, *supra*, at 197 n. 18. *Cf. Humphrey* v. *Moore*, 375 U.S. 335 (1964). We do not understand plaintiffs to so allege in this case. However, on remand leave should be granted to allow them to make such allegations.

be joined. In my opinion, Rule 19(b) F.R.C.P. does not authorize dismissal of an otherwise proper Title VII action against an employer on account of the absence of the union and other employees. Such use of Rule 19 would frustrate the intent of Congress in this type of case.

(2) *Plaintiffs' Title VII action against the union.* Plaintiffs allege that the union was a party to Harvester's collective bargaining agreement, containing allegedly discriminatory seniority lists, and that (after the charges were filed with EEOC) the union agreed to a modification, allegedly for the purpose of permitting a discriminatory reinstatement. Sec. 2000e-2(c)(3) declares it an unlawful employment practice for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." The complaint does not use statutory language, but no argument has been made that it failed to allege an unlawful employment practice on the part of the union.

Assuming that the allegation is sufficient, it appears from the complaint that the union was to some degree responsible (in concert with the employer) for the practice of discrimination under attack, acted to further the practice after a charge had been filed against the employer, and had actual notice of the commission's investigation of the charge. Under all the particular circumstances of this case, I conclude that a strict reading of the statutory authorization of an action "against the respondent named in the charge" is unwarranted, and that the plaintiffs could properly bring action against both the employer and the union.

EEOC filed an amicus brief in which it argued that in this case plaintiffs could properly have joined the union as a defendant without having named it in the administrative charge. EEOC also suggested a procedure by which the

defect, if any, could be cured. Under it, the district court would have stayed the action, pending the filing of a charge by plaintiffs against the union. EEOC could then process the charge so as to allow joinder of the union. Such an approach has been employed in other cases, e.g. *Norman* v. *Missouri Pacific Railroad* (8th Cir., 1969), 414 F.2d 73; *Local U. No. 329, I.L.A.* v. *South Atlanta & Gulf Coast Dist.* (S.D. Tex., 1968), 295 F.Supp. 599. It seems clear that these steps would obviate any jurisdictional question, but under the facts peculiar to this record, it would seem an unnecessary exercise.

(3) *Plaintiffs' possible action under § 1981.* I agree that, given the Supreme Court's *Jones* v. *Mayer* reading of § 1982 with respect to racial discrimination in the sale of property, there is no persuasive reason for reading § 1981 more narrowly with respect to racial discrimination in employment. There remains the difficult question of whether and to what extent the enactment of Title VII restricted reliance upon § 1981. It is unnecessary to resolve that question at this stage if plaintiffs are permitted to proceed against both defendants under Title VII. Perhaps the trial will develop facts which will make resolution important in this case, and I think it wiser not to attempt an answer until that point.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Tuesday, April 28, 1970

Before HON. LUTHER M. SWYGERT, *Chief Judge*; HON. LATHAM CASTLE, *Senior Circuit Judge*; HON. THOMAS E. FAIRCHILD, *Circuit Judge*.

WILLIAM WATERS AND DONALD SAMUELS, ETC., *Plaintiffs-Appellants*, vs. WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, ETC., ET AL., *Defendants-Appellees*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court, in accordance with the opinion of this Court filed this day.

A True Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.